

# ARTICLE

## GENDER SEGREGATION IN THE PUBLIC SCHOOLS; OPPORTUNITY, INEQUALITY, OR BOTH?

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### I. INTRODUCTION

Should the public schools be allowed to segregate girls from boys in the classroom? There is no easy answer to the question, and controversy continues regarding whether girls and boys might benefit or be harmed by separate education. Proponents and opponents of same-sex education do not divide neatly along gender or political lines, and the controversy will not be resolved any time soon. Perhaps as a result of the controversy, the United States Department of Education is encouraging the implementation of experimental programs involving same-sex education.<sup>1</sup> This arti-

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1. See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed. Reg. 62,530 (Oct. 25, 2006) (codified as amended at 34 C.F.R. pt. 106), *available at* <http://www.ed.gov/legislation/FedRegister/finrule/2006-4/102506a.pdf> (providing an amendment to Title IX to create flexibility for the implementation of more single-sex education opportunities); *see also* 34 C.F.R. § 106.34(b) (2008), [http://edocket.access.gpo.gov/cfr\\_2008/julqtr/pdf/34cfr106.34.pdf](http://edocket.access.gpo.gov/cfr_2008/julqtr/pdf/34cfr106.34.pdf) (allowing schools

cle will briefly consider the history of single-sex education, and will evaluate the concerns that single gender classrooms raise. The article concludes that attempts to allow or impose gender segregation should continue only if empirical studies can actually demonstrate that benefits outweigh the harm resulting from such segregation. In the absence of such justification, it might be time to curtail the experiment.

## II. HISTORICAL OVERVIEW

There is no constitutionally recognized right to a public education.<sup>2</sup> However, every state provides a scheme of public education,<sup>3</sup> and the United States Department of Education offers a federal framework of support.<sup>4</sup> While education in the colonies began as a “boys only” en-

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receiving federal funds to have single-sex classes if the purpose of the single-sex class is substantially related to achieving improved educational achievement and the specific educational needs of students). The single-sex class or activity must be implemented objectively and voluntarily and there must be a “substantially equal coeducational [or single-sex] class or extracurricular activity in the same subject or activity” for the “students of the excluded sex.” *Id.*

2. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (holding that education is not a constitutionally recognized right).

[T]he key to discovering whether education is “fundamental” is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution. . . .

Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State’s social and economic legislation. *Id.* at 33, 35.

3. See THOMAS D. SNYDER ET AL., NAT’L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 2007, at 157 tbl. 94 (2008), <http://nces.ed.gov/pubs2008/2008022.pdf> (listing the number of public elementary and secondary schools in each state); see also National Center for Education Statistics, Fast Facts, <http://nces.ed.gov/fastfacts/display.asp?id=372> (last visited Mar. 21, 2009) (stating that there are about 97,000 public schools throughout the nation). “In fall 2008, a record 49.8 million students will attend public elementary and secondary schools. . . . There are about 14,200 public school districts . . .” *Id.*

4. See 20 U.S.C. § 1231c (2006), available at <http://frwebgate1.access.gpo.gov/cgi-bin/TEXTgate.cgi?WAISdocID=537273482256+1+1+0&WAISection=retrieve> (stating that the Secretary of Education is authorized to advise, counsel, and provide technical assistance to local schools attempting to assess available federal benefits, meet the requirements for and apply for certain programs, fully take advantage of applicable programs, simplify administrative procedures, determine cost allocation and collection, and ensure proper dissemination of curricula or instructional materials); see also U.S. Department of Education, Elementary & Secondary Education, Policy Guidance, <http://www.ed.gov/policy/elsec/guid/edpicks.jhtml?src=ln> (last visited Mar. 21, 2009) (providing numerous national policies re-

deavor for the most part, the founding of the new nation and the rapid westward expansion witnessed the creation of a public education scheme placing boys and girls together in the classroom.<sup>5</sup>

Concerns in recent decades regarding unequal educational opportunities between girls and boys led to congressional action.<sup>6</sup> In 1972, President Nixon signed into law what is now known as Title IX.<sup>7</sup> That law provides in part, “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.”<sup>8</sup> As a result of this statute and its implementing regulations, segregating girls from boys in the public schools was essentially prohibited with the narrow exception of physical

garding elementary and secondary education). Educators and the public can access information such as how to implement a uniform and accurate high school graduation rate, Title I regulations, Title III interpretations, and accountability provisions. *Id.*

5. See Patricia B. Campbell & Ellen Wahl, *Of Two Minds: Single-Sex Education, Co-education, and the Search for Gender Equity in K-12 Public Schooling*, 14 N.Y.L. SCH. J. HUM. RTS. 289, 290 (1997) (stating how public education in the United States began as unequal single-sex schooling). After the American Revolution, schools began to teach boys and girls in the same classrooms, and as America grew, boys and girls in the same classroom became the norm. *Id.*

6. See 20 U.S.C. § 1681(a) (2006), available at <http://frwebgate1.access.gpo.gov/cgi-bin/TEXTgate.cgi?WAISdocID=537351488248+0+1+0&WAIAction=retrieve> (mandating that federally funded education programs not discriminate based on sex). Concurrently, the statute prohibits educational institutions from extending preferential or disparate treatment to students of one sex to make up for previously existing imbalances between members of the opposite sex with respect to the benefits received under a federally funded program or activity. *Id.* § 1681(b); see also Rebecca A. Kiselewich, Note, *In Defense of the 2006 Title IX Regulations for Single-Sex Public Education: How Separate Can Be Equal*, 49 B.C. L. REV. 217, 221–22 (2008) (referencing the attention the topic of sex discrimination in education received on Capitol Hill in the 1970s). “The origins of Title IX date back to President John F. Kennedy’s 1961 Executive Order No. 10,980 establishing the President’s Commission on the Status of Women, which revealed distressing levels of sex discrimination in the United States.” *Id.* at 221. Six years later, President Lyndon B. Johnson issued an Executive Order that included the first prohibition on sex discrimination. *Id.* These executive actions eventually garnered congressional support, and congressional hearings held in 1970 exposed widespread sex discrimination in education. *Id.* at 221–22. Title IX emerged as a response to these hearings. *Id.* at 222.

7. See 20 U.S.C. § 1681 (2006), available at <http://frwebgate3.access.gpo.gov/cgi-bin/TEXTgate.cgi?WAISdocID=5381217783+0+1+0&WAIAction=retrieve> (prohibiting discrimination based on sex for federally funded education programs as presented in 1972 by Title IX).

8. 20 U.S.C. § 1681(a) (2006), available at <http://frwebgate3.access.gpo.gov/cgi-bin/TEXTgate.cgi?WAISdocID=5381217783+0+1+0&WAIAction=retrieve> (requiring nondiscrimination for both girls and boys in educational programs and activities receiving federal financial assistance).

education classes, contact sports, human sexuality classes, and courses based on vocal range.<sup>9</sup>

However, in recent decades, researchers have begun to assert that requiring boys and girls to be taught together has a negative impact on the educational progress because of inherent differences in boy/girl learning behavior, or even in the development of their brains.<sup>10</sup> For example, Jean Christophe Labarthe examined two-year old children in their attempts to build bridges from blocks.<sup>11</sup> He concluded that the boys were two times as likely than girls to complete that task.<sup>12</sup> Other studies purported to show a physiological difference in the development of boys' and girls' brains.<sup>13</sup> As a result, educational advocates began to urge that the De-

9. See 34 C.F.R. § 106.34 (2008), [http://edocket.access.gpo.gov/cfr\\_2008/julqtr/pdf/34cfr106.34.pdf](http://edocket.access.gpo.gov/cfr_2008/julqtr/pdf/34cfr106.34.pdf) (creating exemptions to the rule prohibiting schools from conducting education programs/activities or requiring or refusing participation based on sex); see also Diana Jean Schemo, *Change in Federal Rules Backs Single-Sex Public Education*, N.Y. TIMES, Oct. 25, 2006, at A1, available at [http://www.nyfara.org/originals/11.01.06/NYTimes\\_2006-10-25.pdf](http://www.nyfara.org/originals/11.01.06/NYTimes_2006-10-25.pdf) (stating that Title IX essentially prohibited classroom segregation based on sex). "Under Title IX, the 1972 law that banned sex discrimination in educational institutions that receive federal funds, single-sex classes and extracurricular activities are largely limited to physical education classes that include contact sports and to sex education." *Id.*

10. See Rebecca A. Kiselewich, Note, *In Defense of the 2006 Title IX Regulations for Single-Sex Public Education: How Separate Can Be Equal*, 49 B.C. L. REV. 217, 229 (2008) (stating how research shows that girls' and boys' may perform better in single-sex education classrooms).

[H]aving students of only one sex in a classroom eliminates the distraction that students of the other sex pose. In addition, research indicates that girls participate less and receive less attention and encouragement from teachers in coeducational settings. In such settings, girls are also more likely to hide their intelligence, lack self-confidence, and shy away from "male" subjects like math and science. Coeducation also seems to be failing boys, especially in areas such as reading and writing, where studies show that girls tend to outperform them. *Id.* at 229–30. (footnote omitted).

11. Jean Christophe Labarthe, *Are Boys Better than Girls at Building a Tower or Bridge at Two Years of Age?*, 77 ARCHIVES OF DISEASE IN CHILDHOOD 140, 140 (1997), available at <http://www.pubmedcentral.nih.gov/picrender.fcgi?artid=1717266&blobtype=pdf> (reporting on the results of a study that tested two-year old boys and girls ability to build use building blocks). "The purpose of this present study was to determine whether boys are better than girls at using visuospatial abilities . . ." *Id.* The study was composed of 199 boys and 177 girls. *Id.* Eight percent of girls and twenty-one percent of boys observed were able to build a bridge out of blocks. *Id.*

12. *Id.* at 142 ("The most striking result of this study is that boys are more than twice as likely than girls to build a bridge from memory at the age of 2 years.").

13. See generally Harriet W. Hanlon, Robert W. Thatcher & Marvin J. Cline, *Gender Differences in the Development of EEG Coherence in Normal Children*, 16(3) DEVELOPMENTAL NEUROPSYCHOLOGY 479 (1999) (reporting on a study done of 224 girls and 284 boys in the age range of two to four years old). In that study, researchers found that boys' brains develop differently than girls' brains. *Id.* at 479. The study found that boys and girls develop at different rates and times. *Id.* at 502. For example, girls develop about six years earlier than boys in motor and language skills. *Id.* at 492 fig.2.

partment of Education allow for the creation of same-sex educational opportunities.

In response to these studies the Department of Education enacted regulations in October of 2006 allowing for voluntary single-sex classes and activities, provided that a “substantially equal” classroom opportunity was available to both genders.<sup>14</sup> With the establishment of the legal basis for same-sex classrooms, a number of school districts began experimenting with them.<sup>15</sup> According to the website of the National Association for Single Sex Public Education (NASSPE), as of January 2009, approximately 500 single-sex educational programs were being offered throughout the nation.<sup>16</sup> The issue received widespread national attention when *USA Today* published an editorial generally favoring single-sex education on October 13, 2008.<sup>17</sup> The op-ed piece noted that some uni-

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14. See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed. Reg. 62,530 (Oct. 25, 2006) (codified as amended at 34 C.F.R. pt. 106), available at <http://www.ed.gov/legislation/FedRegister/finrule/2006-4/102506a.pdf>; see also 34 C.F.R. § 106.34 (2008), [http://edocket.access.gpo.gov/cfr\\_2008/julqtr/pdf/34cfr106.34.pdf](http://edocket.access.gpo.gov/cfr_2008/julqtr/pdf/34cfr106.34.pdf) (requiring that federally funded, single-sex educational programs be accompanied by an equal educational program available to either both sexes or the excluded sex); Diana Jean Schemo, *Change in Federal Rules Backs Single-Sex Public Education*, N.Y. TIMES, Oct. 25, 2006, at A1, available at [http://www.nyfera.org/originals/11.01.06/NYTimes\\_2006-10-25.pdf](http://www.nyfera.org/originals/11.01.06/NYTimes_2006-10-25.pdf) (reporting that the U.S. Department of Education announced new rules that allow school districts to provide single-sex education as long as they “make coeducational schools and classes of ‘substantially equal’ quality available for members of the excluded sex”). “The new rules, first proposed by the Education Department in 2004, are designed to bring Title IX into conformity with a section of the No Child Left Behind law that called on the Department to promote single-sex schools.”

15. See National Association for Single Sex Public Education, *Single-Sex Schools / Schools with Single-Sex Classrooms / What’s the Difference?*, <http://www.singlesexschools.org/schools-schools.htm> (last visited Mar. 21, 2009) (listing numerous states including, but not limited to, Arizona, California, Florida, Georgia, Idaho, Indiana and Texas that provide single-sex education). In 2006 the U.S. Department of Education enacted the rules allowing for single-sex education. See 34 C.F.R. § 106.34 (2008), [http://edocket.access.gpo.gov/cfr\\_2008/julqtr/pdf/34cfr106.34.pdf](http://edocket.access.gpo.gov/cfr_2008/julqtr/pdf/34cfr106.34.pdf) (listing the effective date as November 24, 2006).

16. *Id.* (last visited Mar. 21, 2009) (reporting that as of January 2009, at least 518 United States public schools offer single-sex educational programs).

Most of those schools are COED schools which offer single-sex CLASSROOMS, but which retain at least some coed activities. . . . [A]t least 95 of the 518 schools below qualify as single-sex *schools*, meaning that students attending any of those schools have all their school activities – including lunch and all electives – in a setting which is all-boys or all-girls. *Id.* (emphasis in original).

17. Op-Ed, *Our View on School Innovation: Single-Sex Education Spreads*, USA TODAY, Oct. 13, 2008, at 12A, available at <http://blogs.usatoday.com/oped/2008/10/single-sex-educ.html> (remarking that single-sex education makes parents and teachers happy and aids children in learning). Theories have developed that suggest that male and female children have different styles of learning and therefore are benefited by separate educational environments. *Id.*

versity researchers were producing findings which suggest academic gains would be possible by gender segregation.<sup>18</sup> The authors of the piece nonetheless expressed some uneasiness about the “brain-based research.”<sup>19</sup> It noted that several nationally recognized neuroscientists raised doubts about the suggestion that there is a physiological difference in the development of the brains of boys and girls.<sup>20</sup> An opposing editorial that appeared on that same date in *USA Today*, written by Emily Martin and Lenora Lapidus, concluded that “what sex segregation really does is create inequality and deprive all students of the benefits of a diverse classroom.”<sup>21</sup>

Thus, the experiment continues. In reality, however, same-sex education in the United States is not an entirely new phenomenon. As noted above, “boys only” was the rule in early American public education.<sup>22</sup> Catholic schools traditionally segregated girls from boys at the high school level, and many such programs continue today.<sup>23</sup>

18. *Id.* (discussing the lack of research offered to schools by the Education Department in order to aid them in setting up single-gender classrooms). While independent researches are not “filling that void,” university researchers are providing some data. *Id.* “Today, even though 442 schools around the USA have single-gender classrooms, the [D]epartment still has no research in the works.” *Id.* The op-ed piece goes on to advocate for continuous experimentation of single-gender classrooms despite the inadequate supply of research. *Id.*

19. *Id.* (alleging that “brain-based” research is insufficient to conclude that same-sex education is beneficial). The danger in conducting experiments without academic research and properly trained instructors is that a negative result could harm the opportunity for future experiments. *Id.*

20. *Id.* (referencing the doubts several neuroscientists have with “brain-based” research).

21. Emily Martin & Lenora Lapidus, *Segregation Breeds Inequality, Coed Schools Lay the Groundwork for Success in a Coed World*, *USA TODAY*, Oct. 13, 2008, at 12A, available at <http://www.usatoday.com/printedition/news/20081013/oppose13.art.htm> (arguing against segregating boys and girls in public schools). “While no evidence persuasively demonstrates that segregating students improves learning, experience has shown that it short-changes both girls and boys. . . . Girls and boys must learn to succeed in a coeducational world.” *Id.*

22. See Patricia B. Campbell & Ellen Wahl, *Of Two Minds: Single-Sex Education, Coeducation, and the Search for Gender-Equity in K-12 Public Schooling*, 14 N.Y.L. SCH. J. HUM. RTS. 289, 290 (1997) (introducing the early history of single-sex education in the American colonies). “In many towns, the first improvement in this respect consisted in smuggling in the girls, perhaps for an hour a day, after the boys had recited their lessons and gone home.” *Id.*

23. See Maryann Gogniat Eidemiller, *Gender Specific*, *OUR SUNDAY VISITOR*, Jan. 25, 2009, available at <http://insightscoop.typepad.com/2004/2009/01/catholic-schools-closing-changing-reconsidering.html> (referencing Sister of Notre Dame Mary Frances Paymans’s viewpoint on single-gender education). “The single-gender schools are part of the richness of our Catholic education heritage in this country and tend to be more historic schools . . . .” *Id.*; see also Archdiocese of San Antonio, Department of Catholic Schools, <http://>

## III. LEGAL CONCERNS

As one might imagine, creating programs for boys only and girls only raises substantial legal concerns. Critics of the gender exclusive educational schemes point to the 1954 case of *Brown v. Board of Education*.<sup>24</sup> In that case, the Supreme Court of the United States found that the “separate but equal” educational schemes which segregated Black students and White students in the public schools constituted a violation of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.<sup>25</sup> The Court concluded in that case that separate was inherently unequal.<sup>26</sup> It pointed to the devastating psychological effects upon Black students that resulted from forced segregation as one of the principal reasons for its conclusion.<sup>27</sup>

Would the *Brown* rationale extend to preclude gender segregation? The Department of Education regulations provide for voluntary gender segregation.<sup>28</sup> Perhaps that factor would make *Brown* inapplicable. As noted below, however, some parents find that these gender segregated classrooms are not really voluntary. Parents face the choice of placing their children in a gender segregated classroom offering a better educational program, or leaving their children in a mixed gender classroom offering an inferior educational program.

Another factor that might make *Brown* inapplicable is the reality that the long and horrible history of slavery led to a racial stigma which has no gender counterpart. Nonetheless, critics urge that the maintenance of a “separate but equal” gender scheme is close enough to the type of dis-

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[www.sacatholicschools.org/schools/schools\\_all.html](http://www.sacatholicschools.org/schools/schools_all.html) (last visited Mar. 21, 2009) (listing four schools that offer single-gender education). In San Antonio, both Texas Central Catholic High School and Holy Cross Middle School are for boys only while Incarnate Word High School and Providence Catholic School are for girls only. *Id.*

24. 347 U.S. 483 (1954). See Rebecca A. Kiselewich, Note, *In Defense of the 2006 Title IX Regulations for Single-Sex Public Education: How Separate Can Be Equal*, 49 B.C. L. REV. 217, 250 (2008) (stating that some opponents of single-sex education cite *Brown* to bolster their arguments against single-sex education policies). “They claim that sex segregation in education similarly does not pass constitutional muster.” *Id.*

25. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place.”).

26. *Id.* (“Separate educational facilities are inherently unequal.”).

27. *Id.* at 494 (noting how segregation in schools has a detrimental effect on African-American children because it causes them to feel inferior which negatively impacts their performance in school). The Court further stated that education “is the very foundation of good citizenship.” *Id.* at 493.

28. See 34 C.F.R. § 106.34(b)(iii) (2008), [http://edocket.access.gpo.gov/cfr\\_2008/julqtr/pdf/34cfr106.34.pdf](http://edocket.access.gpo.gov/cfr_2008/julqtr/pdf/34cfr106.34.pdf) (stating that enrollment in a single-sex educational program or activity is to be completely voluntary).

crimination the Supreme Court of the United States found to be unlawful in *Brown*, and should be precluded as a matter of constitutional law.<sup>29</sup>

In this regard there is a bit of a vacuum; the Supreme Court of the United States has never decided a case involving gender segregation in public education in the grade school or high school context. It did strike as unconstitutional, in 1982, the policy of the Mississippi University for Women's School of Nursing scheme of admitting only women into its program.<sup>30</sup> The school urged that its program was constitutional because it was implemented specifically to remedy past discrimination against women.<sup>31</sup> However, the Supreme Court of the United States determined that women had not been discriminated against in the field of nursing.<sup>32</sup>

29. See Rebecca A. Kiselewich, Note, *In Defense of the 2006 Title IX Regulations for Single-Sex Public Education: How Separate Can Be Equal*, 49 B.C. L. REV. 217, 250 (2008) ("Because the U.S. Supreme Court has not yet ruled on the constitutionality of single-sex education . . . analogous precedent may shed some light on how the Court would rule. Some critics of single-sex education argue by analogy to the Supreme Court's 1954 decision in *Brown*. . . ." (footnote omitted)); see also Martha Minow, *Fostering Capacity, Equality, and Responsibility (and Single-Sex Education): In Honor of Linda McClain*, 33 HOFSTRA L. REV. 815, 821 (2005) (stating how opponents of single-sex education compare gender separation to racial segregation in education).

30. See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 731 (1982) (holding that the university's practice of excluding men from its nursing program was unconstitutional).

Rather than compensate for discriminatory barriers faced by women, MUW's policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job. By assuring that Mississippi allots more openings in its state-supported nursing schools to women than it does to men, MUW's admissions policy lends credibility to the older view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy.

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[T]he presence of men in the classroom would not affect the performance of the female nursing students, and that men in coeducational nursing schools do not dominate the classroom.

Thus, considering both the asserted interest and the relationship between the interest and the methods used by the State, we conclude that the State has fallen far short of establishing the "exceedingly persuasive justification" needed to sustain the gender-based classification. Accordingly, we hold that MUW's policy of denying males the right to enroll for credit in its School of Nursing violates the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 729-31. (citation omitted).

31. See *Hogan*, 458 U.S. at 727 ("The State's primary justification for maintaining the single-sex admissions policy of MUW's School of Nursing is that it compensates for discrimination against women and, therefore, constitutes educational affirmative action.").

32. *Id.* at 729 (concluding that women have not faced discrimination in the nursing field to warrant any type of remedial measure). "It is readily apparent that a state can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification." *Id.* at 728.



Moreover, men were allowed to audit classes at the school.<sup>33</sup> Ultimately, the University could not demonstrate that women would be “adversely affected” by the presence of males in the classrooms in the nursing program,<sup>34</sup> and thus the Court struck down the women-only admission policy.<sup>35</sup>

Contemporary public school classrooms which implement a same-sex policy do provide for comparable opportunities for both boys and girls, although the differences in curriculum, lighting and classroom arrangement, which are important components of these programs, might lead a court to conclude that the opportunities are not sufficiently “comparable” to withstand the *Mississippi University for Women* analysis.<sup>36</sup> Competing studies might cast doubt on the “adversely affected” rationale offered by supporters of gender segregation to justify placing girls apart from boys, thus raising another possibility that the *Mississippi University for Women* decision would preclude such programs. And, it might be difficult to convince a court that girls or boys have been discriminated against in public education by being placed together in a classroom. Without that showing of past discrimination, *Mississippi University for Women* would preclude the remedy of gender segregation.

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[I]n 1970, the year before the School of Nursing's first class enrolled, women earned 94 percent of the nursing baccalaureate degrees conferred in Mississippi and 98.6 percent of the degrees earned nationwide. . . . [T]he labor force reflects the same predominance of women in nursing. When MUW's School of Nursing began operation, nearly 98 percent of all employed registered nurses were female. . . . Thus, we conclude that, although the State recited a “benign, compensatory purpose,” it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification. *Id.* at 729–30. (citation omitted).

33. *Id.* at 721, 731 (“MUW permits men who audit to participate fully in classes. Additionally, both men and women take part in continuing education courses offered by the School of Nursing, in which regular nursing students also can enroll.”).

34. *Id.* at 721 (“To the contrary, MUW's policy of permitting men to attend classes as auditors fatally undermines its claim that women, at least those in the School of Nursing, are adversely affected by the presence of men.”).

35. *Id.* at 731 (“[T]he record in this case is flatly inconsistent with the claim that excluding men from the School of Nursing is necessary to reach any of MUW's educational goals.”). Applying this decision, the United States District Court for the Eastern District of Michigan, Southern Division, enjoined the School District of the City of Detroit from establishing male-only academies. *Garrett v. Bd. of Educ.*, 775 F. Supp. 1004, 1014 (E.D. Mich. 1991) (holding that the interest of males in having male-only academies was “insufficient to override the rights of females to equal opportunities.”).

36. Op-Ed, *Our View on School Innovation: Single-Sex Education Spreads*, USA TODAY, Oct. 13, 2008, at 12A, available at <http://blogs.usatoday.com/oped/2008/10/single-sex-educ.html> (reporting the different teaching techniques gender-separated classes use for girls and boys). In South Carolina, at Taylors Elementary, girls work in groups on projects and work under bright lights while boys work with dimmer lights and do not face one another when working. *Id.*

Another Supreme Court case arguably may provide some guidance in resolving any equal protection challenges to same-sex education. In the case of *United States v. Virginia*,<sup>37</sup> the Court considered a constitutional challenge to the men-only admissions policy of the Virginia Military Institute (VMI).<sup>38</sup> Even though the state of Virginia created a Women's Institute for Leadership in order to defuse the challenge, the Court found the gender segregation at VMI to be unconstitutional.<sup>39</sup> This holding would cast doubt on the validity of the "separate but equal" approach offered by the public schools which have implemented a gender segregation program. It suggests the Department of Education regulations and the programs created thereunder might not escape the *Brown* prohibition. Writing for the majority, Justice Ginsburg summarized the analysis courts would use for cases involving classifications based on gender:

Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. The State must show "at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" The justification must be genuine, not hypothesized . . . .<sup>40</sup>

In the context of public education, Justice Ginsburg's approach would require actual, demonstrated justifications, beyond mere learning theory.

Thus, in both *Mississippi University for Women* and *United States v. Virginia*, the Supreme Court made clear that while it did not establish a blanket prohibition against same-sex education in higher education, any

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37. 518 U.S. 515 (1996).

38. See *United States v. Virginia*, 518 U.S. 515, 530–31 (1996) (stating that there are two issues in the case regarding the VMI's men-only admission policy).

First, does Virginia's exclusion of women from the educational opportunities provided by VMI-extraordinary opportunities for military training and civilian leadership development-deny to women "capable of all of the individual activities required of VMI cadets," the equal protection of the laws guaranteed by the Fourteenth Amendment? Second, if VMI's "unique" situation, as Virginia's sole single-sex public institution of higher education-offends the Constitution's equal protection principle, what is the remedial requirement? *Id.* (citation omitted).

39. *Id.* at 534 (concluding that Virginia's policy of excluding all women from VMI violates the Equal Protection Clause of the Fourteenth Amendment). "Virginia has shown no 'exceedingly persuasive justification' for excluding all women from the citizen-soldier training afforded by VMI." *Id.*

40. *Id.* 532–33 (citation omitted) (summarizing the Court's directions for gender classification cases, as set forth in *Mississippi University for Women v. Hogan*).

justifications for such a program would be scrutinized at more than the “rational basis” scrutiny.

Advocates on both sides of the same-sex public issue have cited these cases. Proponents of gender exclusive classrooms point out the voluntary nature of the programs, and the explicit findings of the Department of Education justifying such programs.<sup>41</sup> Opponents argue that the “separate but equal” analogy applies and that there is inadequate scientific jus-

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41. See Kimberley J. Jenkins, *Constitutional Lessons for the Next Generation of Public Single-Sex Elementary and Secondary Schools*, 47 WM. & MARY L. REV. 1953, 2034 (2006) (“Considerable deference should be given to the decision of a school district to offer dual, voluntary single-sex schools because these schools are less likely to harm either sex, and the structure of such schools achieves some of the work of intermediate scrutiny.”); see also Martha Minow, *Fostering Capacity, Equality, and Responsibility (and Single-Sex Education): In Honor of Linda McClain*, 33 HOFSTRA L. REV. 815, 822 (2005) (“[S]ingle-sex education could be far more defensible where offered on an entirely voluntary basis than where it is mandated by law. If available on an entirely voluntary basis, single-sex education could well convey the social message of expected excellence and invitation to full striving.”). The U.S. Department of Education has encouraged the use of single-sex education based on “[r]esearch [that] shows that some students may learn better in single-sex education environments.” Press Release, U.S. Dep’t of Educ., Secretary Spellings Announces More Choices in Single Sex Education, Amended Regulations Gives Communities More Flexibility to Offer Single Sex School and Classes (Oct. 24, 2006), available at <http://www.ed.gov/news/pressreleases/2006/10/10242006.html> (quoting Secretary Spellings). The U.S. Department of Education’s findings have been supported by other research studies. See Patricia B. Campbell & Ellen Wahl, *Of Two Minds: Single-Sex Education, Coeducation, and the Search for Gender-Equity in K-12 Public Schooling*, 14 N.Y.L. SCH. J. HUM. RTS. 289, 290 (1997) (noting how research has shown that girls and boys have different educational needs and that coeducational schools “shortchange” girls); see also Amanda Elizabeth Koman, Note, *Urban, Single-Sex, Public Secondary Schools: Advancing Full Development of the Talent and Capacities of America’s Young Women*, 39 WM. & MARY L. REV. 507, 509 (1998).

Studies have shown that in contrast to instruction in America’s coeducational public schools, instruction in America’s private, single-sex schools benefitted girls. Without boys, teachers paid attention to girls, and girls competed and excelled in all subjects and activities. Consequently, “[r]esearchers . . . found that women in single-sex schools . . . tend[ed] to demonstrate greater self-confidence, hold less stereotypical attitudes about the role of women, take more math and science courses on higher levels, and outscore their coeducational counterparts on general academic and science tests.” *Id.* (footnote omitted).

tification for these programs.<sup>42</sup> Academic commentators are divided on the legality of these programs.<sup>43</sup>

#### IV. EDUCATIONAL CONCERNS

As noted under the *United States v. Virginia* analysis, the policy permitting same gender classrooms would need to be supported by genuine educational justifications to survive a constitutional challenge. What are some of the concerns, and practical effects of implementation of these programs?

Some have suggested that the impetus between the same-sex classroom movement is the "boy crisis."<sup>44</sup> In her article, *Singling Them Out: The Influence of the "Boy Crisis" on the New Title IX Regulations*, Elizabeth Kisthardt cites a January 2006 *Newsweek* cover story entitled, *The Trouble with Boys*.<sup>45</sup> The *Newsweek* article notes that men now only con-

42. See Brian Johnson, *Admitting that Women's Only Public Education is Unconstitutional and Advancing the Equality of the Sexes*, 25 T. JEFFERSON L. REV. 53, 75 (2002) (arguing against single-sex education and supporting that argument by stating that the studies indicating the benefits of single-sex education are unreliable "largely inconclusive, or poorly controlled"). "Reliable research contrarily indicates that women are, in fact, not currently academically disadvantaged in coeducational settings, and that they gain no material school performance benefits from women's only educational arrangements." *Id.*: see also Galen Sherwin, *Single-Sex Schools and the Antisegregation Principle*, 30 N.Y.U. REV. L. & SOC. CHANGE 35, 41-45 (2005) (providing background on the "separate but equal" doctrine in the context of education).

In arguing that sex segregation is wrong, many critics have adopted the reasoning, exemplified in *Brown v. Board of Education*, that segregation is invidious on its face. They have likened single-sex education to the institutions of the pre-*Brown* racially segregated South, suggesting that sex segregation is a product of the same disingenuous logic that spawned that era's "separate but equal" facilities. *Id.* at 67.

43. See Amanda Elizabeth Koman, Note, *Urban, Single-Sex, Public Secondary Schools: Advancing Full Development of the Talent and Capacities of America's Young Women*, 39 WM. & MARY L. REV. 507, 510-11 (1998) (stating that it is undecided "whether urban, single-sex, public secondary schools" violate Title IX or the Equal Protection Clause of the Fourteenth Amendment).

44. See Elizabeth S. Kisthardt, Comment, *Singling Them Out: The Influence of the "Boy Crisis" on the New Title IX Regulations*, 22 WIS. WOMEN'S L.J. 313, 314 (2007) (stating how the "boy crisis" has been brought to light by the media and has brought attention to boy's academic experience). "In 2006, popular media outlets boldly proclaimed a crisis in public education that hinders the academic success of boys." *Id.* "Although the initial intent of Title IX was to address discrimination against girls, recent discussion concerns boys' academic performance." *Id.* at 323.

45. *Id.* at 323. The author of the *Newsweek* piece is Peg Tyre. Ana Maria Trujillo, *Author to Speak Today on Why Male Students Lag Behind*, SANTA FE NEW MEXICAN, Mar. 22, 2009, available at <http://license.icopyright.net/user/viewFreeUse.act?fuid=MzAwNjc1Nw%3D%3D>. Ms. Tyre noted that "a narrowing of the curriculum and a focus on standardized testing" is a primary reason for boys' underachievement. *Id.* Ms. Tyre concludes

stitute forty-four percent of undergraduate students as opposed to thirty years ago when they represented fifty-eight percent.<sup>46</sup> Furthermore, the article suggests that the academic approaches in recent years are harming the performance of boys.<sup>47</sup> She also cites Christina Hoff Sommers who suggests that boys are the victims of gender discrimination.<sup>48</sup> Sommers's book, *The War Against Boys: How Misguided Feminism Is Harming Our Young Men*, suggests that the trend to consider girls as victims of discrimination has resulted in boys languishing academically.<sup>49</sup> Sommers suggests that single-sex classes would be an appropriate response and says that groups such as the American Civil Liberties Union (ACLU) and the National Organization for Women (NOW) were opposing efforts in the country.<sup>50</sup> However, both the ACLU and NOW have opposed same-sex education on the basis that it leads to the discrimination women traditionally face in public sector.<sup>51</sup>

Will the implementation of gender exclusive classrooms have unforeseen impacts? At Taylors Elementary in South Carolina, girls work in groups and face each other under bright lights.<sup>52</sup> Conversely, boys sit

that "2.5 million more girls than boys" attend college in the United States, and that number increases each year by 100,000. *Id.*

46. Elizabeth S. Kisthardt, Comment, *Singling Them Out: The Influence of the "Boy Crisis" on the New Title IX Regulations*, 22 WIS. WOMEN'S L.J. 313, 323 (2007) (detailing how men, who were previously the majority on college campuses, are now a minority and the causes for such changes).

47. *Id.* at 323–24 ("[N]ew and different standards for academic success are harmful to boys' performance and [the article suggests] that boys are more likely to fail when success is based on test scores and placement in accelerated classes.").

48. *Id.* at 324 (discussing how Sommer's investigation of the research demonstrates "that boys, not girls, are on the weak side of the educational gap").

49. *Id.* (referring to the book by Christina Hoff Sommers's, *The War Against Boys: How Misguided Feminism Is Harming Our Young Men*).

50. *Id.* (citing CRISTINA HOFF SOMMERS, *THE WAR AGAINST BOYS: HOW MISGUIDED FEMINISM IS HARMING OUR YOUNG MEN* 171 (Simon & Schuster 2000)).

51. See National Organization for Women, NOW and Single-Sex Education, <http://www.now.org/issues/education/single-sex-education.html> (last visited Mar. 21, 2009) (voicing strong opposition to the practice of single-sex education). Male and female "collaborative interaction" during primary and secondary educational experiences can help aid in future equality in the workplace. *Id.*; see also Press Release, Am. Civil Liberties Union, ACLU Says Single-Sex Education Proposal Gets Failing Grade (Mar. 3, 2004), available at <http://www.aclu.org/womensrights/gen/13134prs20040303.html> (repudiating the policy of single-sex education and arguing that the implementation of single-sex education will adversely affect the advances against education discrimination that women have already made).

52. Op-Ed, *Our View on School Innovation: Single-Sex Education Spreads*, USA TODAY, Oct. 13, 2008, at 12A, available at <http://blogs.usatoday.com/oped/2008/10/single-sex-educ.html> (naming some of the differences in work environment for the female classrooms as opposed to the male classrooms).

side by side and the lighting is dimmer.<sup>53</sup> In addition, boys study with greater ability to move about the room.<sup>54</sup> One has to wonder whether boys and girls will notice this difference, wonder why the difference is taking place, and perhaps extrapolate feelings of inferiority or superiority. In Breckinbridge County, Kentucky, even though same-sex classrooms are optional, a very talented eighth grade girl was limited to the options of taking a pre-algebra, co-ed class or attending a girls-only more advanced class<sup>55</sup> as the boys had a separate algebra class that moved at a slower pace than the girls' class.<sup>56</sup> Certainly, the students of both genders would notice this difference, wonder about it, and perhaps adopt mistaken notions as a result of it.

These, and similar programs, raise obvious issues as to whether they are indeed "voluntary." They also raise the specter of real harm to children. What happens to those children who are placed in the inferior programs? What if the segregation experiment leads to feeling of inferiority, or results in greater tendency toward acquisition of sexist views or resentments which would only find expression years later?

An advocate for same-sex classrooms notes that "having students of only one sex in the classroom eliminates the distraction that students of the other sex pose."<sup>57</sup> She cites with approval studies indicating that the brains of boys are physically different than those of girls, development of

53. *Id.* (describing the environment for male classrooms at Taylors Elementary).

54. *Id.* (stating that lessons in male-only classrooms include more movement than those in female-only classrooms).

55. Emily Martin & Lenora Lapidus, *Segregation Breeds Inequality, Coed Schools Lay the Groundwork for Success in a Coed World*, USA TODAY, Oct. 13, 2008, at 12A, available at <http://www.usatoday.com/printedition/news/20081013/oppose13.art.htm> (discussing the inequalities in separate classrooms due to sex segregation in public schools).

56. *Id.* (exemplifying a negative result of the new sex-segregated programs in one school in Kentucky).

57. Rebecca A. Kiselewich, Note, *In Defense of the 2006 Title IX Regulations for Single-Sex Public Education: How Separate Can Be Equal*, 49 B.C. L. REV. 217, 229 (2008) (referencing a justification for single-sex education). This rationale was the one that this article's author heard most frequently for the all-boy Catholic high school he attended. An all-girl Catholic school was located down the street. Boys would gather around the girls' school after classes were over in the afternoon. It is not clear whether the segregation from 8 a.m. to 3 p.m. avoided distraction, or resulted in increased interest. In any event, because of financial exigency, the girl's school and the boy's school merged shortly after this author's graduation in 1968. . There is perhaps no way of knowing whether the students were more "distracted" after the merger. While gender integration might produce distraction, a school administrator in Houston recently noted that gender segregation resulted in increased fighting among boys. Jennifer Radcliffe, *KIPP Expanding Single-Gender School Program: Charter for Boys Will Soon Have a Girls' Campus Nearby*, HOUS. CHRON., Feb. 3, 2009, available at <http://www.chron.com/disp/story.mpl/metropolitan/6243311.html> (reporting on the creation of "Houston's first all-girls public school"). Perhaps boys feel some pressure to behave in a more appropriate fashion in the presence of girls?

the brain is different depending upon gender, and boys and girls use different parts of their brain to perform the same tasks.<sup>58</sup> One danger to this approach, however, is that it might be used to justify other forms of discrimination against women or against men based on supposed physiological brain differences which might not be applicable in every case. As noted, leading neuroscientists are not convinced of the accuracy of this research. In addition, some feminists argue that providing girls with a “safe” environment reinforces a stereotype of girls as being weak.<sup>59</sup>

There is also the important matter of parental determination. While parents are offered the choice of allowing their children to be assigned to same-sex classrooms, in many instances the choice is between a superior same-sex education or an obviously inferior co-ed one. Few parents will choose the lesser alternative for their children and thus the “voluntarily” nature of same-sex education might be illusory.<sup>60</sup> While parents with resources can opt to send their children to private schools either co-ed or same-sex, parents with lesser resources do not have that option. Thus, the “experiment” with same-sex classrooms might only be an experiment on those children whose parents lack the resources to opt out of it.

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58. Rebecca A. Kiselewich, Note, *In Defense of the 2006 Title IX Regulations for Single-Sex Public Education: How Separate Can Be Equal*, 49 B.C. L. REV. 217, 229 (2008) (“Evidence indicates that the brains of boys are physically different from those of girls. . . . Additionally, girls’ brains develop differently than those of boys, and girls and boys use different parts of their brains to perform the same tasks.”).

59. Patricia B. Campbell & Ellen Wahl, *Of Two Minds: Single-Sex Education, Coeducation, and the Search for Gender-Equity in K-12 Public Schooling*, 14 N.Y.L. SCH. J. HUM. RTS. 289, 294–95 (1997) (stating that feminists argue that single-sex education stereotypes girls as “weak creatures who can’t handle the rough environment of the real world”). On the other hand, there is some evidence that where men and women achieve equal status in modern societies, the divergence in their personalities seem to increase, with the biggest difference noted in men: “Men in traditional agricultural societies and poorer countries seem more cautious and anxious, less assertive and less competitive than men in the most progressive and rich countries of Europe and North America.” John Tierney, *As Barriers Disappear, Some Gender Gaps Widen*, N.Y. TIMES, Sep. 9, 2008, at F1, available at <http://www.nytimes.com/2008/09/09/science/09tier.html?pagewanted=print> (reporting on research studies that have found that throughout time men’s personalities have changed more than women’s). Thus, based upon this research, some might conclude that promoting equality and breaking stereotypical gender roles might actually increase the divergence between the personalities of men and women.

60. See Emily Martin & Lenora Lapidus, *Segregation Breeds Inequality, Coed Schools Lay the Groundwork for Success in a Coed World*, USA TODAY, Oct. 13, 2008, at 12A, available at <http://www.usatoday.com/printedition/news/20081013/oppose13.art.htm> (reporting how parents in Kentucky discovered that the best math class for their daughter, a talented math student, was a single-sex classroom). While the parent’s preferred coeducation, they could not remove their daughter from the single-sex classroom without compromising her education. *Id.*

## V. CONCLUSION

After decades of struggle to eliminate gender stereotypes and barriers, we should be very cautious about re-imposing them in the form of segregated classrooms. Even though the experiment has begun, it should not continue without greater scientific explanation and justification for the programs than have been offered to date. Research must continue into the long-term effects of gender segregation. Unfortunately, the only way these effects could be measured is by experimenting upon our children and hoping that if there are adverse effects, that there might be some way to ameliorate them. Perhaps one approach would be to conduct the studies on existing gender-segregated programs in private schools. Even then, it might be difficult to measure and ameliorate long-term adverse effects. While the gender segregation experiment continues, we must be particularly cautious that we are not inadvertently teaching gender stereotypes that find unfortunate expression outside of the public education context.

In the absence of "exceedingly persuasive" empirical justification,<sup>61</sup> and unless it can be shown that continuing the programs will do no harm, it might now be time to curtail the experiment. Instead of trying to find justification for segregation, it might be a better use of resources to focus on improving an educational system where boys and girls can learn together.

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61. *Virginia*, 518 U.S. at 524 (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). Writing for the majority, Justice Ginsburg noted that "a party seeking to uphold government action based on sex must establish an 'exceedingly persuasive justification' for the classification." *Id.*